JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Mon Aug 15 12:40:07 2011
//caseml/case/mlj/04_-_Hassan_bin_Kadir1_184486_126936_01

Hassan bin Kadir & Ors v Mohamed Moidu bin Mohamad & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–729 OF 2002
LOW HOP BING, HELILIAH AND KANG HWEE GEE JJCA
6 JANUARY 2010

Land Law — Sale of land — Sale of less than two-fifths of a hectare of agricultural land — Whether a 'registrable dealing' under National Land Code — Deed of sale executed before coming into force of s 205(3),(4) & (5) of the National Land Code — Section 205(3) not to have retrospective effect

By a deed of sale and irrevocable power of attorney ('the deed') dated 7 October 1978, the plaintiffs/respondents purchased a portion of a land measuring about 21,000 square feet ('the said portion') from the defendants'/appellants' father. The plaintiffs paid the full purchase price of RM42,000 and took possession of the said portion. The defendants' father passed away on 17 November 1978. The defendants obtained a distribution order as beneficiaries of their late father's estate, wherein the land, including the said portion, was transmitted to the defendants as registered owners. The plaintiffs requested the defendants to transfer the said portion to them but the defendants refused. The plaintiffs then filed this suit, inter alia, for a declaration that the plaintiffs were entitled to the said portion under the deed and the defendants as trustees to transfer the same to the plaintiffs as registered co-owners thereof. The learned judicial commissioner held: (i) that a constructive trust existed in favour of the plaintiffs in relation to the said portion; and (ii) that pursuant to s 417 of the National Land Code ('NLC'), the trust be endorsed on the register document of title. The defendants appealed on the grounds that s 205(3)of the NLC prohibited co-proprietorship of agricultural land of less than two-fifths of a hectare. The plaintiffs' contended that the deed was executed on 7 October 1978, before s 205(3), (4) and (5) came into force on 25 March 1985.

Held, dismissing the appeal with costs:

(1) Section 205(3) is to be read subject to sub-ss (4) and (5). The deed was executed some six to seven years before the enactment of s 205(3) as modified by s 205(5). Therefore s 205(3) was inapplicable. Instead, s 205(5) prevailed and the deed was not rendered invalid by s 205(3). The effect of introducing s 205(5) was to preclude the retrospective effect of s 205(3) on certain instruments (see para 16).

(2) The orders made by the court below was within the ambit of the NLC (see para 18).

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Mon Aug 15 12:40:07 2011
//caseml/case/mlj/04_-_Hassan_bin_Kadir1_184486_126936_01

[Bahasa Malaysia summary

Melalui surat ikatan jualan dan surat kuasa wakil ('surat ikatan') yang tidak boleh dibatalkan bertarikh 7 Oktober 1978, plaintif-plaintif/responden-responden telah membeli sebahagian tanah berukuran lebih kurang 21,000 kaki persegi ('bahagian tersebut') daripada bapa defendan-defendan/perayu-perayu. Plaintif-plaintif membayar penuh harga belian sebanyak RM42,000 dan mengambil milikan bahagian tersebut. Bapa defendan-defendan meninggal dunia pada 17 November 1978. Defendan-defendan telah mendapat perintah pembahagian sebagai benefisiari-benefisiari kepada harta pusaka arwah bapa mereka, yang mana tanah tersebut, termasuk bahagian tersebut, telah dipindahkan kepada defendan-defendan sebagai pemilik-pemilik berdaftar. Plaintif-plaintif meminta defendan-defendan untuk memindahmilik bahagian tersebut kepada mereka tetapi defendan-defendan enggan. Plaintif-plaintif kemudiannya memfailkan tindakan ini, antara lain, untuk satu deklarasi bahawa plaintif-plaintif adalah berhak kepada bahagian tersebut di bawah surat ikatan dan defendan-defendan sebagai pemegang amanah untuk memindahkannya kepada plaintif-plaintif sebagai pemilik-pemilik bersama berdaftar. Pesuruhjaya kehakiman memutuskan: (i) bahawa amanah konstruktif wujud di pihak plaintif-plaintif berkenaan bahagian tersebut; dan (ii) bahawa menurut s 417 Kanun Tanah Negara ('KTN'), amanah haruslah diendorskan di dalam pendaftaran dokumen hakmilik. Defendan-defendan merayu dengan alasan bahawa s 205(3) KTN melarang ketuanpunyaan bersama tanah pertanian bagi kurang daripada dua per lima hektar. Plaintif-plaintif menghujahkan bahawa surat ikatan telah dimeterai pada 7 Oktober 1978, sebelum s 205(3), (4) dan (5) berkuatkuasa pada 25 Mac 1985.

Diputuskan, menolak rayuan dengan kos:

(1) Seksyen 205(3) haruslah dibaca bersama tertakluk kepada sub-s (4) dan (5). Surat ikatan telah dimeterai selama enam hingga tujuh bulan sebelum berkuatkuasanya s 205(3) seperti yang dipinda oleh s 205(5). Dengan itu s 205(3) tidak terpakai. Sebaliknya s 205(5) mengatasi dan surat ikatan tidak menjadikannya tidak sah di bawah s 205(3). Kesan daripada memperkenalkan s 205(5) adalah untuk menghalang kesan retrospektif s 205(3) terhadap instrumen-instrumen tertentu (lihat perenggan 16).

(2) Perintah-perintah yang dikeluarkan oleh mahkamah adalah dalam skop KTN (lihat perenggan 18).]

Notes

For cases on sale of land generally, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4443-5070.

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Mon Aug 15 12:40:07 2011
//caseml/case/mlj/04_-_Hassan_bin_Kadir1_184486_126936_01

Cases referred to

Tan Eng Leng & Anor v Pentadbir Tanah Daerah, Kuala Muda, Sungei Petani [1988] 2 MLJ 665 (refd)

Verama v Arumugam & Anor [1982] 1 MLJ 107, HC (refd)

Legislation referred to

National Land Code ss 205(3), (4), (5), 417

Appeal from:

Civil Suit No 22–205 of 1996 (High Court, Johor Bahru)

Matthews George (Matthews George & Co) for the appellants.

Robert Lai (Fadzilah Mansor with him) (Jackson & Masacorale) for the respondents.

Low Hop Bing JCA (delivering the judgement of the court):

APPEAL

[1] This is an appeal by the appellants ('the defendants') against the decision of the learned judicial commissioner who had, after a full trial, allowed the respondents' ('the plaintiffs') claim in part and ordered:

(a) that the defendants do hold the land comprised in GM 482 (previously known as EMR 381) Lot 261, in the Mukim of Plentong, District of Johor Bahru ('the land') subject to the constructive trusts created in favour of the plaintiffs to the extent of 21,000 square feet thereof ('the said portion') pursuant to the execution of the deed of sale and irrevocable power of attorney ('the deed') dated 7 October 1978; and

(b) that pursuant to s 417 of the National Land Code, the registrar of titles or the land administrator, as the case may be, do cause an endorsement to be entered on the register document of title of the trusts aforesaid in favour of the defendants herein.

FACTUAL BACKGROUND

[2] By the deed, the plaintiffs purchased the said portion in the land from the defendants' father.

[3] The plaintiffs had duly paid the full purchase price of RM42,000 and taken possession of the said portion. The existence of trusts in favour of the plaintiffs is not disputed.

[4] The defendants' father passed away on 17 November 1978.

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Mon Aug 15 12:40:07 2011
//caseml/case/mlj/04_-_Hassan_bin_Kadir1_184486_126936_01

[5] The defendants then obtained a distribution order as beneficiaries of their late father's estate, wherein the land, including the said portion, was transmitted to the defendants as registered owners in equal shares.

[6] When the plaintiffs discovered this fact in 1986, they requested the defendants to transfer the said portion to them but the defendants refused.

[7] The plaintiffs then lodged a private caveat on the land. The plaintiffs' application to the Johor Bahru land administrator to vary the distribution order was rejected.

[8] Later the plaintiffs filed an originating summons against the defendants but withdrew it with liberty to file afresh.

[9] Subsequently, the plaintiffs filed a writ of summons against the defendants praying for, inter alia, a declaration that the plaintiffs are entitled to the said portion under the deed and the defendants as trustees do transfer the same to the plaintiffs as registered co-owners thereof, failing which the senior assistant registrar shall execute the transfer of the said portion to the plaintiffs and that the registrar of titles be directed to register the same in favour of the plaintiffs; and costs.

CO-PROPRIETORSHIP UNDER S 205(3), (4) AND (5)

[10] The defendants' primary ground of appeal presented by learned counsel Mr Mathews George is that the learned judicial commissioner has erred in relying on equity and in directing the land administrator to endorse the plaintiffs' interest notwithstanding s 205(3) of the National Land Code which, according to him, prohibits co-proprietorship of agricultural land of less than two-fifths of a hectare. He cited *Verama v Arumugam & Anor* [1982] 1 MLJ 107 (HC) in support thereof.

[11] The plaintiffs' learned counsel, Mr Robert Lai (assisted by Ms Fadzilah Mansor) argued that the deed has been validly executed on 7 October 1978, before s 205(3), (4) and (5) came into force on 25 March 1985.

[12] The above submissions call for the determination of the following question:

> Does s 205(3) of the National Land Code, read with s 205(4) and (5), prohibit the High Court from making the above orders?

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Mon Aug 15 12:40:07 2011
//caseml/case/mlj/04_-_Hassan_bin_Kadir1_184486_126936_01

[13] It is essential for us to refer to s 205(3) which provides as follows: A

205 Dealings capable of being effected, and persons capable of taking thereunder

(3) Subject to sub-section (4), no dealing in respect of any alienated land subject to the category 'agriculture' or to any condition requiring its use for any agricultural purpose shall be effected if such dealing would have the effect of B creating any undivided share of such size that, if the land is to be partitioned in proportion to the several shares, the area of any resulting individual portion would be less than two-fifths of a hectare.

[14] Section 205(3) was expressly enacted subject to s 205(4) which merits C reproduction as follows:

(4) The prohibition imposed by sub-section (3) shall not apply to those cases where upon the coming into force of the said sub-section, any alienated land held by D any person or body, is less than two-fifths of a hectare, or an undivided share in any alienated land held by any person or body represents a portion of less than two-fifths of a hectare, and dealings shall be capable of being effected in respect of such alienated land or undivided share therein:

Provided that — E

(i) any such dealing shall be in respect of the whole of the alienated land and shall be in favour of only one person or body; or

(ii) any such dealing shall be in respect of the whole of any undivided share in any alienated land and shall be in favour of only one person or body, or F one or more co-proprietors of the said land.

[15] It is noteworthy that s 205(3) and (4) are in turn to be construed in the light of s 205(5) in the following words: G

(5) *Nothing contained in sub-section (3) and (4) shall render invalid any instrument effecting any dealing in any alienated land or any undivided share therein executed under this part before the commencement of this section*. (Emphasis added.)

H

[16] The amendment in s 205(3) was inserted vide s 77 of Act A587/1984 to prohibit the holding of agricultural land by co-owners where the area of the individual portions is less than two-fifths of a hectare: see *National Land Code — A Commentary by Judith Sihombing* (1992) at p 379. However, as alluded to above, s 205(3) is to be read subject to sub-ss (4) and (5). The amendment in I s 205(5) was effected by s 24 of Act A625/1985 which came into force on 25 March 1985. The deed in the instant appeal was executed on 7 October 1978, some six to seven years before the enactment s 205(3) as modified by s 205(5). It is therefore axiomatic that s 205(3) is inapplicable. Instead, s 205(5) prevails

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Mon Aug 15 12:40:07 2011
//caseml/case/mlj/04_-_Hassan_bin_Kadir1_184486_126936_01

and the deed is not rendered invalid by s 205(3). The effect of introducing s 205(5) is to preclude the retrospective effect of s 205(3) on certain instruments. In the circumstances of this appeal, s 205(5) prevails. Hence the deed is not rendered invalid by s 205(3).

[17] In *Tan Eng Leng & Anor v Pentadbir Tanah Daerah, Kuala Muda, Sungei Petani* [1988] 2 MLJ 665, Lim Beng Choon J (as he then was) upheld the purchase of land in 1979 and the execution of the transfer in 1980 although the presentation for registration was rejected by the land administrator who relied on the provisions of s 205(3). The learned judge held that the transfer was executed before 25 March 1985 and so s 205(3) could not invalidate it. Instead s 205(5) applied and so nothing contained in s 205(3) could have rendered the purchase and transfer invalid.

[18] In *Verama*, cited for the defendants, Arulanandom J (as he then was) held that our land laws, which are governed by the National Land Code, would not be tampered by equity. However, we note that in the instant appeal, there is no necessity for the learned judicial commissioner to apply any doctrine of equity, as the existence of trusts in favour of the plaintiffs had not been disputed. We found that the orders made by the court below was within the ambit of the National Land Code. We therefore see no substance in the submission presented for the defendants.

CONCLUSION

[19] In view of the grounds given above, we held that the learned judicial commissioner was correct in making the said orders. We therefore dismissed the defendants' appeal with costs of RM3,000 and affirmed the said orders. Deposit to the plaintiffs on account of the fixed costs.

Appeal dismissed with costs.

Reported by Kanesh Sundrum